IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

LARRY CAMPBELL, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Supreme Court Journal, Washington, D. C.

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LARRY CAMPBELL, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled cause on July 29, 1965.

OPINION BELOW

The published opinions of the courts below are reported at 235 F. Supp. 611 (I D.A. 314a-321a)[1] and

[1] "D.A." references are to Appellants' Joint Appendix as printed for the Court of Appeals. "G.A." references are to the Government's Appendix as printed for the Court of Appeals. "T." references are to the typewritten transcript of the trial proceedings in this case, which transcript is on file with the Court.

349 F. 2d 20 (Appendix A of co-petitioner Hoffa, No. , this term).

JURISDICTION

The judgment of the court below (Appendix A, *infra*) was entered on July 29, 1965; a timely petition for a rehearing was denied on October 7, 1965 and on October 19, 1965, Mr. Justice Stewart granted the petitioner an extension of time for the filing of this petition for writ of Certiorari to and including December 6, 1965. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. (A) Whether petitioner was deprived of rights protected by the Fourth and Fifth Amendments where he was convicted solely by reason of a suspicion arising from his relationship to his co-defendants, without any affirmative evidence of any act or declaration by him from which his complicity as an aider and abettor could be inferred.

(B) Whether the right of petitioner to be acquitted for failure of the Government to offer proof of his guilt is protected by the due process clause of the Fifth Amendment to the Constitution.

(C) Whether the conviction of a defendant charged with a substantive offense may be sustained on the theory of conspiracy, solely on hearsay statements of others.

2. Whether, where the trial court ordered the names of the petit jury array kept secret until the first day of the trial of petitioner, the trial court committed prejudicial error in refusing to grant petitioner, a

Negro, a hearing to determine whether or not there had been a systematic exclusion of cognizable elements of the community from the panel, and particularly a systematic exclusion of Negroes.

3. Whether the mere allegation in a multiple count indictment of "aiding, abetting, counseling, commanding, inducing and procuring" a co-defendant to corruptly endeavor to influence, intimidate and impede a named petit juror in the trial of another co-defendant (in the light of a trial and conviction on a conspiracy theory without either indictment for conspiracy, or final jury charge on conspiracy) is constitutionally adequate to apprise petitioner of the charge to be met and to meet due process standards.

4.[2] Whether evidence obtained by the Government by means of deceptively placing a secret informer in the quarters and councils of a defendant during one criminal trial so violates the defendant's Fourth, Fifth and Sixth Amendment rights that suppression of such evidence is required in a subsequent trial of the same defendant on a different charge.

5. Whether petitioner was denied a fair and impartial trial as guaranteed by the Fifth and Sixth Amendments by reason of:

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[2] The foregoing questions are discussed in this petition as reasons for granting the writ. On the questions numbered 4 through 11 petitioner adopts the reasons for granting the writ which are advanced by co-petitioner Hoffa in his petition, No. ...., this term. On the questions numbered 12 through 14 petitioner adopts the reasons for granting the writ which are advanced by co-petitioner King on his petition, No. ...., this term. On the questions numbered 15 and 16 petitioner adopts the reasons for granting the writ advanced by co-petitioner Parks in his petition, No. ...., this term.

(A) The Court's refusal to postpone the trial in Chattanooga because of continuous prejudicial publicity, even though the Court, three weeks earlier, had found that substantially identical publicity made fair trial for petitioner impossible in Nashville.

(B) The prejudicial effect upon the jury of the Government's constant guarding of the jury and Government witnesses by an extraordinary number of Marshals.

6. Whether petitioner was denied a fair trial because admitted Government surveillance conducted prior to and during trial engendered such fear in petitioner and his counsel as to deny him effective assistance of counsel and to impair his right of private consultation with counsel.

7. Whether petitioner was deprived of a fair trial by the erroneous admission and retention of highly prejudicial evidence, (including a transcript of a trial judge's statements in a former prosecution against co-defendant Hoffa), in support of the counts on which petitioner was convicted and without according him his constitutional rights of confrontation and cross-examination.

8. Whether the indictment of petitioner was invalid by reason of: (a) the delegation of the Jury Commission's duties of grand jury selection to non-official "suggestors" (consisting primarily of bankers, Postmasters, and State Court officials, and not including any wage earner, manual laborer, or representative of organized labor) and the Jury Commission's blanket acceptance of the persons supplied by the "suggestors" without any investigation or examination by the Jury

Commission to determine whether such persons were qualified or constituted a cross-section of the community; (b) the trial court's refusal to grant petitioner a hearing to prove improper delegation of the duties of the Jury Commission in selecting the grand jury, and the systematic exclusion of elements of the community from the grand jury venire; and (c) the failure of the Court in voir dire examination to inquire whether the members of the Grand Jury panel were biased against petitioner because of prejudicial publicity against him relating to the impending Grand Jury investigation.

9. Whether a Government agent's hearsay testimony of the alleged knowledge of a grand jury witness, who refuses to testify on the claim of Fifth Amendment privilege, constitutes probable cause for indictment.

10. Whether a defendant is deprived of a fair trial:

(A) When jury instructions to apply the law of conspiracy are repeatedly given throughout a trial from which the conspiracy count has been severed on a judicial finding of prejudice; and

(B) When the trial judge abandons to the jury his function of determining the existence of *aliunde* evidence of conspiracy in admitting the declarations of alleged co-conspirators against a non-present alleged conspirator.

11. Whether a defendant is deprived of a fair trial by the prosecutor's statements in final argument to the jury:

(A) That a co-defendant's consultation with counsel and participation in his own trial indicates his guilt; and

(B) That the prosecutor personally believes the defendants to be guilty.

12. Whether, in the circumstances of the trial in this case, there was prejudicial error in curtailing the cross-examination and impeachment of the main Government witness, Partin, including

(A) The denial of an opportunity to cross-examine Partin with respect to recordings of telephone conversations with co-defendant Hoffa.

(B) The refusal to permit the witness Reynolds to testify that Partin had attempted to suborn his testimony in confirmation of Partin's testimony, and

(C) The exclusion of the testimony of Mrs. Partin, who had been subpoenaed by the defense.

13. Whether the trial court committed prejudicial error in refusing to give a cautionary instruction as to the testimony of informer Partin and in instructing that a witness is presumed to testify truthfully.

14. Whether there was prejudicial error in the trial court's refusal to declare a mistrial because of

(A) The prosecutor's cross-examination of co-defendant King concerning said co-defendant's invoking the Fifth Amendment privilege in a prior and connected proceeding;

(B) The prosecutor's cross-examination of co-defendant Hoffa as to whether he had told King to invoke the Fifth Amendment privilege; and

(C) The prosecutor's statement in final argument to the jury that King had invoked the Fifth Amendment privilege.

15. Whether it was prejudicial error to deny severance for trial of the four substantive counts either prior to or during the trial.

16. Whether the trial court committed prejudicial error in overruling motions for mistrial and to strike the testimony of Government interviewed witnesses, where F.B.I. agents had deliberately destroyed their original notes of interviews with such witnesses.

In addition to the above questions, if the writ be granted without limitation, the petitioner reserves argument on the merits of the following questions.

17. Whether the court committed prejudicial error in refusing to disclose to the defense for impeachment purposes the Grand Jury testimony of the key Government witness.

18. Whether the testimony of Government witness Partin should have been suppressed on the ground that it was paid for by the Government in violation of 18 U.S.C. 201(h).

19. Whether the trial court committed prejudicial error

(A) In refusing to order production of a Government agent's notes on an informer Government witness' reports to such agent; and

(B) In refusing to order production of Government reports for the purpose of determining what Government evidence was the fruit of the interception and recording of telephone conversations between co-defendant Hoffa and Government informer Partin.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution provides in pertinent part:

> ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . ."

18 U.S.C., Section 1503 provides, in pertinent part:

> "Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States . . . or any grand or petit juror, . . . or corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Title 18 U.S.C., Section 2 provides:

> "(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.
>
> "(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

STATEMENT

Petitioner was sentenced to three years' imprisonment following his conviction by a jury of aiding and abetting a violation of 18 U.S.C., Section 1503 under Count Three (the only Count which charged him) of a five-count indictment (VII D.A. 3568a).

A. The Indictment

From October 22 to December 23, 1962 co-petitioner Hoffa was tried in the United States District Court for the Middle District of Tennessee, Nashville Division, in a criminal prosecution referred to in the record as the "Test Fleet Case." Alleged endeavors to corruptly influence the petit jurors in the trial of that case resulted in the indictment of Hoffa, this petitioner, and other defendants, for four separate endeavors to corruptly influence separate petit jurors. Count Three charged that the defendant Parks endeavored to corruptly influence one Gratin Fields, a juror in the Test Fleet Case, and that in so doing, the defendant Parks was aided, abetted, counseled, commanded, and induced by petitioner and defendant Hoffa (I D.A. 66a-71a).

B. Challenge to the Petit Jury Panel

The case was set for trial on January 20, 1964 (I D.A. 21a) and on December 28, 1963, 23 days before trial, the Court transferred the case for trial from the Middle District of Tennessee to the Eastern District of Tennessee, at Chattanooga (I D.A. 22a). On January 9, 1964, a panel of petit jurors was drawn for the trial of the case (I D.A. 222a). On January 15, 1964, petitioner filed a motion to continue his trial (I D.A. 24a) and a motion asking the Court to make public the

names of the jurors summoned to try the case (I D.A. 24a, 222a-224a). The Court entered an order on January 16, 1964, overruling the motion for a continuance (I D.A. 25a). On Saturday, January 18, 1964, the Court entered an order overruling Petitioner's motion to make known a list of the jurors summoned for jury service (I D.A. 26a, 227a-229a). Petitioner's attorney did not receive a copy of this order or the names of the veniremen until the following Monday, January 20, 1964, the day the trial began (II D.A. 450a, 454a, 461a).

Petitioner then presented a motion to strike the jury panel (I D.A. 230a). Petitioner, a Negro, pointed out to the Court that of the eighty veniremen present in the courtroom that morning, only four were Negroes (II D.A. 454a). The Court permitted Petitioner to present his contentions in the record (II D.A. 449a-472a). Petitioner presented detailed figures from the United States Census Report revealing that of the adult population of Hamilton County, the most populous county in the judicial district, 18.6 percent were Negro; that of the adult population of the other eight counties in the district approximately 12½ percent were Negro; and that the four Negro veniremen constituted only about 4½ percent of the veniremen summoned. All of the four Negroes were from Hamilton County and were teachers and contractors. None was a blue-collar worker. The venire panel contained a disproportionately large number of school teachers and retired persons. The census reports revealed that school teachers constituted less than one-tenth of one percent of the adult population of the district (II D.A. 454a-459a). In advising the Court as to the residence and businesses of the four Negro veniremen who were present, Petitioner's counsel made it clear that he was relying on information he had received.

Petitioner asked the Court for permission to question the Clerk and the Jury Commissioner, which permission the Court refused to grant (II D.A. 459a, 471a-472a). The Court's ruling was subsequently confirmed with a written order denying a hearing on the grounds that Petitioner's motion was not timely and that no *prima facie* showing had been made (I D.A. 314a-321a). The Court of Appeals affirmed on the same grounds.

Petitioner claimed that the Court should grant a full hearing on his motion, and that his motion was timely because his attorney had proceeded as expeditiously as possible under the circumstances. Petitioner had previously requested that the Court make public the jury panel so that independent inquiry as to the veniremen could be made by him (I D.A. 24a, 222a-224a).

C. Evidence of Commission of the Alleged Crime by the Principal—Endeavor to Influence Juror Fields

The evidence revealed alleged efforts by the Defendant Parks to contact Juror Fields through Nashville police officer James T. Walker and the juror's son, Carl Fields (II D.A. 608a-632a, 732a-742a). No other defendant was present at the time of any of these alleged attempted contacts. These alleged efforts occurred about November 1, 1962 (II D.A. 731a).

D. Evidence of Petitioner's Alleged Aiding and Abetting Such Endeavor

Petitioner is a nephew of Defendant Parks (V D.A. 2108a) and was a union associate of Defendant Hoffa (V D.A. 2217a). The Government's evidence relating to Petitioner consisted solely of telephone company business records of calls made over telephones to which

the Petitioner had access and which he was shown to have used on occasion.

On October 20, 1962, two days before the beginning of the Test Fleet trial, Petitioner went to Louisville, Kentucky. From that day until November 28, 1962, he was in Louisville about 25 days (V D.A. 2241a-2242a). Defense evidence was that Petitioner was in Louisville to assist in union organizing at the General Electric plant (V D.A. 2219a-2221a, 2271a-2272a, 2307a-2312a). From October 21 to November 14, there were 23 phone calls between Petitioner and Parks (II D.A. 823a-828a, 857a-881a). The Government offered no proof as to the content of these telephone conversations. Petitioner and co-defendant Parks testified that they concerned family matters (V D.A. 2098a, 2225a, 2233a).

Carl Fields testified that about November 1, 1962, Defendant Parks asked him to find out what color clothes his father would be wearing the next day, and further commented that he, Parks, "had to make a call to Louisville before nine o'clock." (II D.A. 740a).

Witness Edward Grady Partin testified that on November 7, 1962, Defendant Hoffa stated to him that "I have the colored male juror in my hip pocket; one of my business agents, Campbell, who is related to the juror, came into Nashville prior to the trial and took care of it * * *." (III D.A. 1393a).[3]

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[3] In its brief in the Court of Appeals (p. 230), the Government conceded "that appellant Hoffa's statement to Partin, made on November 7, identifying Campbell as the man who 'took care of' the negro male juror, is not to be considered in deciding whether the evidence against Campbell was enough to sustain his conviction."

When the first material witness testified, the defense objected to hearsay declarations as to defendants other than the maker, requesting that the jury be instructed to consider them only against the maker (II D.A. 610a-611a). The Court, however, instructed the jury at length on the law of conspiracy. This instruction covers more than four pages of the printed record and covers the entire field of the law of conspiracy, the law of hearsay, all exceptions to the hearsay rule, including admissions against interest, declarations of conspirators in furtherance of conspiracy, the requirement that there be proof *aliunde,* and an extensive definition of the crime of conspiracy (II D.A. 611a-615a). The Court stated to the jury that it was admitting hearsay statements against the speaker, but that the evidence was also admitted as to any other defendant as to whom it should be established to the satisfaction of the jury that there was a conspiracy, that the defendant in question was a member of the conspiracy, and that the statement was made in furtherance of the conspiracy.

The defense specifically objected to the instructions and to the injection of the concept of conspiracy into this trial of substantive offenses (II D.A. 615a-619a).

The conspiracy instructions were repeated each time the defendants objected to such hearsay during the trial (II D.A. 639a-645a, 733a, 770a-771a; III D.A. 1352a, 1397a, 1421a, 1442a). The trial court made no preliminary determination of the existence of evidence *aliunde* showing a conspiracy in admitting declarations of alleged co-conspirators against an alleged non-present conspirator; but left that determination entirely to the jury. The case, however, was not submitted to the jury on the theory of conspiracy.

E. Incorporation of Statements in Petitions of Co-petitioners Concurrently Filed

Petitioner incorporates herein by reference the statements of the case and facts set forth in the petitions for a writ of certiorari filed concurrently herewith by his co-petitioners Hoffa, Parks and King, insofar as applicable to Petitioner. These statements are made with reference to reasons for granting the writ which Petitioner is adopting. If statements with respect to these reasons were set forth herein, they would not materially differ from those of the co-petitioners.

REASONS FOR GRANTING THE WRIT

A. Deprivation of Due Process by Conviction Without Proof in Conflict With Nye and Nissen and Morel, Infra

History demonstrates that great concepts of fair play in the administration of justice, such as the concept that one can be found guilty only upon proof by evidence, have originated independently in different civilizations. Will Durant tells[4] how this principle was brought into Roman law by Julian the Apostate:

> "... He established the principle that an accused person should be accounted innocent till proved guilty. Numerius, a former governor of Gallia Narbonensis, was charged with embezzlement; he denied the charge, and could not be confuted at any point. The judge Delfidius, exasperated by lack of proofs, cried out: 'Can anyone, most mighty Caesar, ever be guilty if it be enough to deny the charge?' To which Julian replied: 'Can anyone be proved innocent if it be enough to have

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[4] Will Durant, *The Age of Faith* (1950), p. 12.

> accused him?' 'and this,' says Ammianus, 'was one of many instances of his humanity.' "

The concept there announced went unheeded for a thousand years, but by the time of the formation of the colonies in this country and the adoption of the Constitution, the concept of due process had embodied in it this ancient statement of Julian the Apostate that no person could be convicted except upon proof of his guilt.

The embodiment of this concept in due process of law has found expression in rulings that, without other admissible evidence, guilt cannot be adjudicated from an estimate of the character of a co-defendant,[5] a strong suspicion of guilt,[6] flight from the scene of a crime,[7] an offer to bribe the arresting officer,[8] nor the fabrication of an alibi.[9]

Petitioner asserts that this Court will, where constitutional rights have been violated (Fourth and Fifth Amendments), make such survey of the evidence as may be required to assure protection of these

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[5] *United States* v. *Mann* (C.A. 7, 1939), 108 F. 2d 354.

[6] *Evans* v. *United States* (C.A. 9, 1958), 257 F. 2d 121; *Thomas* v. *United States* (C.A. 10, 1956), 239 F. 2d 7; *Wise* v. *United States* (C.A. 5, 1957), 241 F. 2d 545; *Spencer* v. *United States* (C.A. 5, 1956), 239 F. 2d 5; *Vick* v. *United States* (C.A. 5, 1954), 216 F. 2d 228.

[7] *Vick* v. *United States* (C.A. 5, 1954), 216 F. 2d 228; *Neal* v. *United States* (C.A. 8, 1939), 102 F. 2d 643.

[8] *United States* v. *Kelly* (D.C., D.C., 1954), 119 F. Supp. 217.

[9] *United States* v. *Ford* (C.A. 2, 1956), 237 F. 2d 57 (vacated because of mootness, 355 U.S. 38).

rights.[10] *Nye and Nissen* v. *United States,* 336 U.S. 613, limits the evidence available in light of the charge under which the case was submitted—compared to the treatment of such evidence by the Court of Appeals—and the comparison demonstrates the total lack of evidence to support Petitioner's conviction. Petitioner asserts that the Sixth Circuit Court of Appeals was oblivious to *Nye and Nissen, supra,* and disregarded its own opinion in *Morei* v. *United States* (C.A. 6, 1942), 127 F. 2d 827. *Morei,* cited with approval by this Court in at least two cases, and cited with approval by most, if not all, Courts of Appeals enunciated a rule of law dealing with aiders and abettors in direct conflict with the decision of the Sixth Circuit in Petitioner's case. *Morei* teaches that the aider and abettor statute does combine the common law concept of principal in the second degree (aider and abettor) and accessory before the fact but does not broaden either of these concepts. There is absolutely no evidence that Petitioner in this case fell within the concept of principal in the second degree. Regarding the

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[10] *Napue* v. *Illinois,* 360 U.S. 264, wherein this Court held at 271-272:

> ". . . The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate. Martin v. Hunter (US) 1 Wheat 304, 4 L. ed. 97; Cooper v. Aaron, 358 US 1, 3 L. ed. 2d 5, 78 S. Ct. 1401. This principle was well stated in Niemotko v. Maryland, 340 US 268, 271, 95 L. ed. 267, 270, 71 S. Ct. 325, 328: 'In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.'"

common law concept of accessory before the fact, *Morei* states it thus:

> "... A person is not an accessory before the fact, unless there is some sort of active proceeding on his part; he must incite, or procure, or encourage the criminal act, or assist or enable it to be done, or engage or counsel, or command the principal to do it. Halsbury, supra, Section 531. Strictly speaking, in order to constitute one an accessory before the fact, there must exist a community of unlawful intention between him and the perpetrator of the crime. The concept of an accessory before the fact presupposes a prearrangement to do the act (see West v. State, 25 Ala. App. 492, 149 So. 354); and to constitute one an aider and abettor, he must not only be on the ground, and by his presence aid, encourage, or incite the principal to commit the crime, but he must share the criminal intent or purposes of the principal ..."

Thus under *Morei,* the Government must prove Petitioner counseled, commanded or procured Parks to commit the offense. Suspicion brought about by Petitioner's employment by the Teamsters Union, telephone calls, admittedly of unknown content, presence in Louisville, Kentucky, during the time involved, constitute no proof under *Morei* or any other concept of the law of evidence as establishing guilt. This reasoning by the Sixth Circuit is proscribed in *Nye and Nissen, supra,* because the case was not submitted to the jury under instructions that they could find Petitioner guilty on the ground of his being a conspirator with Parks and that Parks' conduct was carrying out such conspiracy. The Court of Appeals, nevertheless, seemed to have affirmed on this basis. The Court of Appeals discussed the evidence on the basis of its

sufficiency to establish a conspiracy. This permitted Petitioner to be convicted on mere suspicion.

The instant indictment charged Defendant Parks with endeavoring to corruptly influence Juror Fields in the Test Fleet case. Petitioner, a minor official in the Teamsters Union in Detroit, and a nephew of Parks, was charged along with Hoffa, with having aided, abetted, counseled, commanded and procured Parks to commit the offense. The evidence against Petitioner consisted solely of (1) his presence in Louisville, Kentucky, during the period of the Test Fleet trial; (2) during this period a large number of telephone calls of unknown content were made to Defendant Parks in Nashville; (3) the above-mentioned alleged hearsay statements by Defendants Parks and Hoffa. There was no evidence that Petitioner was present, actually or constructively, in Nashville, Tennessee,[11] or that he aided or abetted Parks as a principal in the second degree. The Government's case against Petitioner could be sustained only upon proof that he counseled, commanded, or induced the commission of the offense by Parks.

The Court of Appeals concluded, *Nye and Nissen* notwithstanding, that a conspiracy (even though not charged) existed between Parks, Campbell and Hoffa to corruptly influence Juror Fields and that telephone calls per se, and a business relationship between Petitioner and Hoffa were sufficient to prove that Petitioner counseled, commanded or procured criminal conduct by Parks. This conclusion, and the strained

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[11] He had not been in the State of Tennessee for about two years and then had volunteered to drive a truck load of food to "Tent City" in West Tennessee (V D.A. 2225a-2226a).

effort of reaching it, is in direct conflict with not only *Nye and Nissen, supra,* and *Morei, supra,* but the total concept of the establishment of guilt by evidence rather than on suspicion. The Court of Appeals held that the jury could disbelieve Petitioner's testimony of the innocent purpose of the telephone calls, and could conclude, without evidence, that they were for guilty purposes. This is but an assumption of guilt merely from the denial of the accused. It violates the concept anciently discovered by Julian the Apostate and presently embodied in the concept of due process of law. The Court of Appeals said:

> "The Government offered no proof as to the subject matter of telephone calls. Campbell testified that they related to Union or family matters. * * * The jurors were not concluded by Campbell's explanation of the telephone calls. * * *
>
> "The evidence was circumstantial. The jury could infer that Campbell was in constant communication with the conspirator Parks and that Campbell reported thereon to Hoffa by way of Detroit.
>
> "Once a conspiracy has been established, only slight evidence is necessary to connect a defendant with it."

A conspiracy count charging Hoffa is still pending. If a substantive count may be tried on the theory of conspiracy, this would involve constitutional problems of double jeopardy.

This Court should grant certiorari to determine whether the sufficiency of the evidence to sustain a conviction on a substantive offense may be determined on the theory of conspiracy, including hearsay statements of alleged co-conspirators.

Otherwise, Petitioner will be imprisoned on hearsay declarations, when, even if a conspiracy existed, certainly as to Hoffa's alleged statement, not only has no Court determined that it furthered the conspiracy (*Krulewitch* v. *United States,* 336 U.S. 440) but also it could not in fact have furthered any conspiracy.

B. Deprivation of Due Process by Refusal to Hear Evidence on Systematic Exclusion of Negroes from Petit Jury Panel in Conflict With Coleman and Arnold, Infra

In *Coleman* v. *Alabama,* 377 U.S. 129 (1964), this Court ruled that even a post-trial motion, attacking the system of impaneling grand and petit juries on the ground of the systematic exclusion of Negroes, was timely. The trial court had entertained the motion to a limited extent, instead of summarily overruling it as being untimely. This Court in reversing said:

> "Since the case comes here in that posture and the record shows that petitioner was not permitted to offer evidence to support his claim, the judgment of affirmance must fall." (377 U.S. at 133),

and held that the defendant was entitled to introduce evidence to prove the allegations of his motion. Here, not only did Petitioner file such a motion before the trial commenced, but also he was permitted to make an offer of proof, to present figures from the census reports, and to note that the panel contained only four Negroes, all from one county. Thus, the Court did not summarily strike the motion as untimely. As in *Coleman,* the Court considered and ruled on the motion, but did not permit the Petitioner to prove the allegations by evidence.

In presenting the motion to the Court, it was called to the Court's attention that there were only four Negroes among eighty prospective jurors brought into the courtroom.[12] It was represented to the Court that Petitioner's counsel had been advised that not one Negro from the eight counties outside of Hamilton County was placed in the jury box, that the four Hamilton County Negroes were all contractors or school teachers, and that had Hamilton County Negroes been properly represented on the panel, there would have been fifteen Negroes from that county alone. Further, the action of Petitioner's counsel was as diligent as possible under the circumstances. Until December 28, 1963, he thought the case would be tried in the Middle District. On that date, it was transferred for trial to the Eastern District at Chattanooga. Thereafter, local counsel had to be retained, the facts of the case discussed with them, witnesses subpoenaed, etc., in preparation for the early trial setting of January 20. After such consultation with local counsel, on January 15, Petitioner filed a motion asking the judge to release the names and addresses of the jury panel so that he could determine whether there had been any exclusion by race. This reasonable request was denied by the Court on the Saturday before the Monday trial setting. The order of denial was not received by de-

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[12] Petitioner, a Negro, moved to strike the array not only because of the systematic exclusion of Negroes, but also because of the systematic limitation of the number of blue-collar workers on the jury panel. This latter systematic exclusion was brought about by a systematic inclusion of disproportionately large numbers of groups which evidently would find it more convenient to serve as jurors, such as school teachers and retired persons. The panel contained a number of teachers, though teachers constituted less than one-tenth of one percent of the adult population of the district.

fense counsel until the day that the case came on for trial. In the courtroom that same day, he received for the first time copies of questionnaires filled out by the eighty veniremen, showing their race and employment. It is, therefore, submitted that Petitioner acted as promptly as could reasonably be expected in bringing the matter to the Court's attention. Nor would the requested hearing have unduly delayed the commencement of the trial. Petitioner sought only the testimony of the Clerk and Jury Commissioner, both of whom were present in the courtroom. *Coleman* v. *Alabama, supra,* clearly required that Petitioner be permitted to adduce evidence as to his allegations.

Further, the allegations, offer of proof and facts represented by Petitioner's counsel made out a *prima facie* case of systematic exclusion of Negroes from petit jury duty and a denial of equal protection of the law. *Arnold* v. *North Carolina,* 376 U.S. 773 (1964); *Eubanks* v. *Louisiana,* 356 U.S. 584; *Hernandez* v. *Texas,* 347 U.S. 475.

C. Deprivation of Due Process by Indictment Charging an Alleged Aider and Abettor in Words of Statute, in Conflict With Russell, Infra

The indictment charged that Defendant Parks endeavored to influence Juror Fields in the Test Fleet case, and further charged merely that Petitioner aided, abetted, counseled, commanded, and induced said principal. The evidence showed that Petitioner was never in Nashville, and the Government's case was based solely on telephone company records of long distance calls.

Petitioner, in seeking review in this Court, is aware that many cases hold that the use of the language of

the Aider and Abettor Statute, 18 U.S.C. Section 2, without factual allegations, is sufficient for indictment purposes. *United States* v. *Simmons,* 96 U.S. 360, and *Coffin* v. *United States,* 156 U.S. 432.

But recently in *Russell* v. *United States,* 369 U.S. 749, the Court adopted a radically different and analytical approach to whether a particular indictment is invalid because of failure to descend to the particulars of an element of the offense charged. In *Russell,* the indictments were in the language of the statute, charging the defendants with criminal contempt of Congress for refusing to answer questions "pertinent to the question under inquiry," (at 752). Transcripts of testimony before the congressional committee would have demonstrated whether the questions were germane to any legitimate legislative inquiry. Nevertheless, this Court held that the indictments were insufficient, stating (at 765-766):

> "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, *it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particular.'* United States v. Cruikshank, 92 US 542, 558, 23 L.ed. 588, 593. *An indictment not framed to apprise the defendant 'with reasonable certainty, of the nature of the accusation against him . . . is defective, although it may follow the language of the statute.'* United States v. Simmons, 96 US 360, 362, 24 L.ed. 819, 820. 'In an indictment upon a statute, *it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all ele-*

> *ments necessary to constitute the offense intended to be punished;* . . .' United States v. Carll, 105 US 611, 612, 26 L.ed. 1135. . .
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> "The vice which inheres in the failure of any indictment under 2 USC Section 192 to identify the subject under inquiry is thus the violation of the basic principle 'that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him . . .' United States v. Simmons, supra (96 US at 362). *A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined.*" (Emphasis supplied)

Russell teaches that a defendant has the right to be fairly apprised in the indictment of the charges that he must face; else he is deprived of due process of law as guaranteed by the Fifth Amendment.

In the foregoing circumstances, a question, resolvable only in this Court, arises—whether the validity of the indictment in this proceeding is governed by *Simmons* and *Coffin* or by *Russell*. Petitioner asserts that it is important to the administration of criminal justice that this Court determine whether the use of the language of the Aider and Abettor Statute is *always* sufficient, regardless of the facts of the case, to advise the defendant of what he should be prepared to meet at the trial. Under the facts of this case, Petitioner was not so advised by the indictment.

The indictment alleged that Petitioner aided, abetted, counseled, induced, and procured Parks to commit the substantive offense. There was no evidence that Petitioner was ever in Nashville; and, at the trial, the Government relied on records of telephone calls, contending that Petitioner was engaged in a conspiracy

with both Parks and Hoffa to influence Juror Fields. The Court of Appeals sustained the case on the same theory of conspiracy. This was indeed a departure from the indictment as understood by Petitioner.

With the trial court below having ordered the conspiracy count severed to prevent prejudice, Petitioner anticipated proof of specific acts of aiding and abetting as alleged in the indictment, rather than general conspiracy relationships. Certainly, the language of the indictment, which did not descend to the particular in charging Petitioner, failed to apprise him that he would be tried for conspiracy, not only with the principal, but also with Hoffa. We point out that this Court, in ruling that the indictment was insufficient in *Russell*, considered it in the light of the facts of the case.

D. Incorporation of Reasons for Granting the Writ Advanced in Petitions of Co-petitioners Concurrently Filed

Petitioner incorporates herein by reference the reasons for granting the writ of certiorari advanced in the petitions filed concurrently herewith by his co-petitioners Hoffa, Parks and King with respect to questions numbered 4 through 16 as stated heretofore as questions presented in this petition. If these reasons were set forth herein, they would not materially differ from those advanced by co-petitioners.

CONCLUSION

For all of the reasons advanced, the petition should be granted.

Respectfully submitted,

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